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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1159

DUN & BRADSTREET, INC.,
Petitioner,

versus

DAVID POPE HOOD,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In this brief, we will attempt to follow the divisions as made in the Petition for Certiorari.

DIVISIONS I and II

OPINION BELOW AND JURISDICTION

Respondent is not dissatisfied with Divisions I and II of the Petition, relating to the opinion below and jurisdiction of this Court. The case below is *Hood v. Dun & Bradstreet, Inc.*, 486 F. (2d) 25 (Fifth Circuit 1973).

DIVISION III

QUESTIONS PRESENTED

Respondent states that the first paragraph of Division III of the Petition for Certiorari contains incorrect and confusing statements, particularly as to the holding of the Court below and the facts before it. For example, the Fifth Circuit did not hold that the false report was "inadvertently made", nor that it was made "without malice".

Respondent does not believe that the six questions are presented when the facts of this case are accurately and correctly stated, such facts being briefly as follows:

The petitioner made and published to persons doing business with DAVID P. HOOD, General Contractor, a false report, on more than one occasion, stating that specified suits had been filed against him; also, the last time the report was sent out, it included reference to the suits, and that DAVID P. HOOD had been unavailable for comment, and that he had always declined financial information, and that his working capital appeared to be limited and slowness was noted. All these statements were false.

The false report was first made on April 15, 1968, and was repeated on July 23, on August 25, and on October 11, 1968. These repeated false reports were made in violation of, and in disregard of, its own prac-

tices and procedures usually followed by DUN & BRADSTREET, INC.

The error in the false report of October 11, 1968, was brought specifically to the attention of DUN & BRADSTREET, INC., on October 16, 1968, but that company, contrary to its usual practice to make corrections in twenty-four hours, did not make any correction until November 7, 1968, and then at the instance of plaintiff and his counsel, and then only in an incomplete manner.

The plaintiff's business was damaged by these false reports.

All of the repeated false reports of April 15, July 23, August 25, and October 11, 1968, were admittedly false.

Under these circumstances, the petitioner asserted as one defense, so far as here pertinent, that under a specified Georgia statute (Section 105-709 of the Code of Georgia of 1933), the reports in question were privileged communications, contending, in effect, that it had a right to include in its reports such libelous statements as heretofore referred to.

This Georgia statute (at which time it was Section 2980 of the Georgia Code of 1882) was construed by the Georgia Supreme Court in *Johnson v. The Bradstreet Company*, 77 Ga. 172. That case involved a false report to its contractors by a company whose business, as stated by the Court, was "to furnish informa-

tion, for consideration paid them, touching the standing of merchants in various parts of the United States".

The construction reached by the Georgia Supreme Court was that the statute did not confer a privilege in regard to such a communication. The communication there, as in this case, was libelous. The judgment of the Court (77 Ga. 175) was:

> "In our judgment, this communication, made under this contract, is not the result of a private duty, either moral or legal, in the sense of the statute law of this state, and therefore, is not a privileged communication."

The Georgia Supreme Court has not limited this construction to only credit reporting companies, as contended by petitioner in Certiorari. In *Western Union Telegraph Co. v. Pritchett,* 108 Ga. 411, the Court held that a similar false statement made by one company to another regarding the trade of an individual, under an agreement to swap credit information, was not a privileged communication within the meaning of the Georgia statute.

The Fifth Circuit correctly concluded that a Georgia Court would follow these decisions and would hold, that properly construed, the Georgia privileged communications statute was not intended to, and did not, include communications of credit reporting agencies. Accordingly, the Fifth Circuit held that the District Court should have applied the construction of the Supreme Court of Georgia decision and should have held

that the false reports in this case were not communications included in the Georgia privileged communications statute.

Respondent therefore submits that the questions enumerated by petitioner are not presented, because (as to each, as numbered by petitioner):

1. The false report was not "inadvertently" erroneous.

2, 3. There is no denial of equal protection. The Georgia decisions hold that false reports of others than credit reporting agencies affecting the trade or business of an individual, are also not within the provisions of the Georgia privileged communications statutes (see *Western Union Telegraph Co. v. Pritchett*, 108 Ga. 411). The repeated false reports were each published with such complete disregard of petitioner's normal business practices, and with such disregard of notice of the falsity of the report, and of the consequences, as to amount to malice. The false reports were not inadvertently and innocently erroneous, and by reason of the circumstances of repetition, they were made in an excessive manner.

4. There is no denial of the right of contract. Petitioner may continue to do credit reporting but must respond in damages for libelous false reports. In effect, the position of petitioner is that it must be able to libel others in order to perform its contracts with its subscribers.

5. The Fifth Circuit properly held that the petitioner was not entitled to a constitutional privilege under the First Amendment. *Grove v. Dun & Bradstreet, Inc.*, 438 F.(2d) 433, cert. den., 404 U. S. 898.

6. The ruling of the District Judge was contrary to the Georgia statute (Section 6-1611 of the Code of Georgia of 1933) providing that the Georgia Supreme Court decisions in question can not be reversed or materially changed except with concurrence of at least five justices of the Court. There are no decisions of the Georgia Supreme Court indicating that that Court would overrule or modify the decisions in question. The action of the District Court was clearly erroneous in failing to follow and apply the judgment of the Supreme Court of Georgia, wherein that Court held that the statutes of Georgia did not afford the status of a privileged communication to the communication of the type published by the petitioner in this case. The Fifth Circuit correctly reversed the District Court in this regard and correctly held that the District Court should have followed this decision of the Supreme Court of Georgia.

DIVISION IV

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondent submits that the constitutional provisions and statutes referred to in Division IV of the petition are not involved.

Georgia Code Section 105-709 is not involved because the false report was not included as a privileged communication by any of the subsections of that Code Section, as authoritatively construed by the Georgia decisions.

The First and Fourteenth Amendments to the Constitution of the United States are not involved because the false reports were not afforded any constitutional privilege by the First Amendment and there was no denial to petitioner of equal protection of the laws afforded by the Fourteenth Amendment.

Section 105-702 of the Georgia Code of 1933 (Section 2977 of the Georgia Code of 1882), insofar as pertinent, declares that slander consists:

> "in charges made against another in reference to his trade, office or profession, calculated to injure him therein."

This definition is incorporated in the statutory definition of libel in Georgia (Appendix to Petition for Certiorari, A-29).

DIVISION V

STATEMENT OF THE CASE

There are substantial inaccuracies and omissions in the Statement of the Case by petitioner in Division V of its petition.

The facts, in brief, are that the petitioner, on four repeated occasions, published false statements that suits had been filed against David P. Hood, General Contractor. The repetition of the publication of the false reports regarding these suits was entirely unnecessary. The business of David P. Hood was damaged by these false statements. The suits were not against David P. Hood, General Contractor, but were against an entirely different person, a restaurant operator engaged in an entirely different business. The district judge declined to follow decisions of the Georgia Supreme Court construing a Georgia statute (now Section 105-709, Georgia Code of 1933), which made provisions for privileged communications in certain instances only, which Georgia Supreme Court decisions rule that communications such as the false reports of petitioner were not included in the communications intended to be covered by that statute. The Fifth Circuit ruled that the district court should have followed the Georgia decisions. A more complete statement of facts, with references to the Appendix filed in the Fifth Circuit, is set out in the Footnote below.

FOOTNOTE: The references herein are to the Appendix filed in the Fifth Circuit Court of Appeals.

The offending false report (Plaintiff's Exhibit "1", A. 110) was published October 11, 1968. The report identified the subject as David P. Hood, General Contractor (A. 110, 156). The false statement in the report regarding suits was: "Public records reveal suit #248479 filed June 10, 1968, for $103, Whittock Dobbs, Inc. vs Subject." The managing agent of petitioner testified that the first above suit could refer to the amount of $103,000.

Before October 11, 1968, Dun & Bradstreet, Inc. had previously sent out and published reports regarding these suits three times before. All these previous reports also ascribed

The statement on Page 6 of the petition that the district judge was "applying Georgia law" is incorrect.

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the suits to David P. Hood, General Contractor (A. 113-114). These previous reports were published April 15, 1968 (A. 114), July 23, 1968 (A. 113), and August 25, 1968 (A. 113) (A. 162, 163, 164).

It was the normal procedure of Dun & Bradstreet, Inc., when including suits in their published reports, to contact the person who was the subject of the suit and ask for the subject's version of the suit, but that company did not follow this procedure before publishing the repeated false reports of these suits on April 15, July 23, August 25, and October 11, 1968 (A. 164-165, 152).

No person connected with the company had ever looked at the record of the suits referred to in the false reports (A. 165-166). If they had looked at the records, there would not have been any basis for the company getting the suits confused with Respondent (A. 166-167). The suits (A. 115-130) do not indicate that the defendant in the suits was David P. Hood, General Contractor, the defendant named therein being another person engaged in a different business.

It was the normal practice of the company to issue a correction of an error and notify all people concerned within twenty-four hours (A. 169). This policy and practice was not followed in regard to the report published October 11, 1968, regarding David P. Hood. The company had been put on notice of the error regarding the suits on October 16, 1968 (A. 61), but did not issue a correction notice or notify anyone in twenty-four hours. Instead, the company did nothing about correcting the false reports from October 16, 1968, until November 7, 1968 (A. 61-62); (A. 169-170); (A. 173-174). The correction notice of November 7, 1968, was prompted by Hood and his attorney, contacting the company (A. 176-177). The correction notices were mailed before they were shown to Hood and his attorney (A. 143).

It was the policy of Dun & Bradstreet, Inc., each time an investigation was made of a subject, to offer to show the report to the subject to check for the accuracy of the information contained in the report (A. 152, 164-165). This policy was not followed in regard to the subject David P. Hood in regard to any of the false reports dated April 15, July 23, August 25, and October 11, 1968, regarding suits (A. 152, 162-165).

The district judge expressly declined to follow Georgia decisions construing the statute law of Georgia which defined privileged communications (now Georgia Code 1933, Section 105-709), and holding that "in the sense of this statute law", the communications of credit reporting agencies are not included as privileged communications under the statute.

Moreover, the district judge, in failing to follow *Johnson v. The Bradstreet Co.*, 77 Ga. 172, 175, and *Western Union Telegraph Co. v. Pritchett*, 108 Ga. 411, acted contrary to Georgia Code Section 6-1611, which is as follows:

> "Decision of Supreme Court, how reversed. — A decision rendered by the Supreme Court prior to the first day of January 1897, and concurred in by three Justices, cannot be reversed or materially changed except by the concurrence of at least five Justices. Unanimous decisions rendered after said date by a full bench of six shall not be overruled or materially modified except with the concurrence of six Justices, and then after argument had, in which the decision, by permission of the court, is expressly questioned and reviewed; and after such argument, the court in its decision shall state distinctly whether it affirms, reverses, or changes such decision."

Under this Code Section, the decisions in the above two cases, until changed or modified in the manner specified in the Code Section, were "as binding and

obligatory on all the Courts as would be an act of the general assembly". *Greenfield and Brown v. Vason*, 74 Ga. 126, 128-129. As can be seen, this Code Section provides that modification or reversal cannot occur except upon express permission of the Supreme Court for the decision to be questioned and reviewed. No such permission has been obtained in this case. Moreover, the Georgia general assembly or legislature has not changed this statute, nor its interpretation by the Georgia Supreme Court in the above cases. This the Georgia legislature could have done if the Court's interpretation had been deemed incorrect, or no longer correct.

Petitioner's quotation, on Pages 6 and 7 of the petition, from the case of *Johnson v. The Bradstreet Co.*, 77 Ga. 172, 175, is incomplete and fails to set forth the following very pertinent language of the opinion which expresses the judgment of the Court:

> "If one makes it his business to pry into the affairs of another in order to coin money for his investigations and information, he must see to it that he communicate nothing that is false. The falsehood of the communication, in print or in writing, maligning in effect the private character and mercantile standing, is itself evidence of malice, legal malice; and unless it be strictly a privileged communication in the performance of a public duty, or a private duty, moral or legal, and then bona fide and note 'as a cloak for private malice' (Code §2981), the right of action and redress by dam-

> ages are the remedies of the injured. In our judgment, this communication, made under this contract, is not the result of a private duty, either moral or legal, in the sense of the statute law of this state, and therefore is not a privileged communication."

The Fifth Circuit Court of Appeals simply held:

> "The district court should have adhered to the early decisions of the Georgia Supreme Court and (should have) held that there was no conditional privilege afforded defendant under Georgia law". (Appendix to Petition for Certiorari, A-39).

An indication of the continued incorrect reporting of petitioner appears on Page 8 of the petition. There, petitioner makes the statement that the false credit report of October 11, 1968, referred to two suits against David Hood. A simple reference to the offending report reveals that the suits were stated in the false report to be against David P. Hood, General Contractor. *Even in the Petition for Certiorari, petitioner cannot correctly report to the Court the contents of its own report of October 11, 1968.* By now, petitioner should be fully aware of the error and be able to correctly report it since the suits were against an entirely different person engaged in an entirely different business.

Nor can it be correctly said as a fact that the false report was an "inadvertent" one since the report was repeated four times in complete disregard of the nor-

mal procedure of petitioner, and although one of petitioner's customers brought to its attention on October 16, 1968, that the report was not correct, petitioner did not attempt any correction until November 7, 1968. This long delay in attempt at correction was also contrary to the normal procedure of petitioner to make correction in twenty-four hours. Petitioner characterizes the attempted correction as "immediate", but the attempted correction, delayed from October 16, 1968, until November 7, 1968, can hardly be said to be an "immediate" correction attempt.

DIVISION VI

RESPONDENT'S REPLY TO PETITIONER'S ARGUMENT AND REASONS FOR THE ALLOWANCE OF THE WRIT

Much of the argument of petitioner is based on obvious confusion on the part of petitioner as to what was ruled in the case of *Johnson v. The Bradstreet Co.*, 77 Ga. 172, 175; in the case of *Western Union Telegraph Co. v. Pritchett*, 108 Ga. 411; and in the decision of the Fifth Circuit.

The judgment in *Johnson v. The Bradstreet Co.* was:

> "In our judgment, this communication, under this contract is not the result of a private duty, either moral or legal, *in the sense of the statute laws of this state*, and therefore is not a privileged communication."

This judgment, by the language "in the sense of the statute laws of this state", shows on its face that it was a judgment construing and determining the correct application of the statute law of Georgia.

The statute law of Georgia is the same now as it was in 1886, the date of the decision in *Johnson v. The Bradstreet Co.* Georgia Code 1882 was then in effect, and contained the following sections: Georgia Code 1882 contained Section 2974 defining libel (now Georgia Code 1933, Section 105-701); Georgia Code 1882 contained Section 2977 defining slander (now Georgia Code 1933, Section 105-702); and Georgia Code 1882 contained Section 2980 prescribing privileged communications (now Georgia Code 1933, Section 105-709). Thus, it is apparent that these statutes as construed in *Johnson v. The Bradstreet Co.* have not been changed by the Georgia legislature.

In Georgia, statutory libel includes the conduct contained in the statutory definition of slander, *Hood v. Dun & Bradstreet, Inc.*, 486 F.(2d) 25. Georgia Code 1882, Section 2977 (now Georgia Code of 1933, Section 105-702) declared that slander consists "in charges made against another in reference to his trade, office or profession, calculated to injure him therein", and the statute provides for action thereon.

As held in *Johnson v. The Bradstret Co.*, 77 Ga. 175, the above statute law made it illegal in Georgia in regard to another "to make false statements about his character and business respectability".

At the same time of the said Johnson case, in the statute law of Georgia, there was Georgia Code 1882, Section 2980 (now Georgia Code of 1933, Section 105-709) which defined as privileged communications "statements in the performance of a private duty, either legal or moral".

It is noteworthy that the first mentioned statute (1882 Georgia Code Section 2977) expressly made actionable "charges against another in reference to his trade, calculated to injure him", while the second mentioned statute (1882 Georgia Code Section 2980) did not expressly make such charges privileged communications. Accordingly, the Court construed the two statutes, determined their application, and held (77 Ga. 175):

> "If one makes it his business to pry into the affairs of another in order to coin money for his investigation and information, he must see to it that he communicate nothing that is false. The falsehood of the communication, in print, or writing, maligning in effect the private character and mercantile standing is itself evidence of malice, legal malice. . . . In our judgment, this communication, made under this contract, is not the result of a private duty, either moral or legal, in the sense of the statute law of this state, and therefore is not a privileged communication."

As can be seen, the Court did not declare the credit company's contract void — it simply held that the con-

tract with subscribers did not free the company from liability under the libel statutes of Georgia for false reports regarding the trade of an individual, calculated to injure him therein.

Also, the decision in *Johnson v. The Bradstreet Co.* was made in 1886, four years after Georgia Code 1882 was adopted, and the decision in that case represented a construction of the intent and meaning of the statute law in the Code. It is noteworthy that the Georgia legislature to this date has not enacted any statute to make any change of the Court's statutory construction as contained in the Court's judgment.

The Fifth Circuit did not undertake to enlarge on the rulings in *Johnson v. The Bradstreet Co.*, but held that the district court should have followed that case and should have held that the Georgia privileged communication statute did not include statements made in the report of petitioner to its subscribers, in this case.

In *Western Union Telegraph Co. v. Pritchett*, 108 Ga. 411, the construction of the privileged communications statute by the court in the case of *Johnson v. The Bradstreet Co.* was approved and applied to an agreement between companies to swap credit information; the court holding that false statements in the swapped information were not privileged communications under the Georgia privileged communications statute (now Georgia Code 1933, Section 105-709).

Obviously, a contract expressly agreeing to publish a libel against another is illegal; such a contract does not impose a legal or moral duty to libel; and the court in *Johnson v. The Bradstreet Co.* so held. The argument of petitioner is most confused, but we do not believe that petitioner takes issue with the above ruling of the court.

Next, the court in *Johnson v. The Bradstreet Co.* reasoned that the contract of the credit reporting company did not impose on the credit company a duty to publish false libelous reports and that any false report published by the credit reporting company was beyond the duty imposed by its contract, and hence such false report was not made in the performance of any duty, legal or moral, in the sense of the statute prescribing privileged communications.

In *Western Union Telegraph Co. v. Pritchett,* 108 Ga. 411 (1899), the Supreme Court of Georgia followed the same reasoning and reached the same conclusion regarding the swapping of credit information by two companies.

Rather than being illogical as contended by petitioner, it can be seen that the reasoning of the Georgia decisions is most logical. It recognizes that an express contract to libel would be illegal and would not impose any legal or moral duty. The reasoning then recognizes that credit reporting contracts impose only an obligation to make correct reports and do not impose any obligation or duty to make false or libelous reports. This reasoning logically suggests that any false or li-

belous statements made in credit reports were not made in the performance of any duty imposed by the contract; hence, the false reports were not made in the performance of any "duty, legal or moral" as contemplated by the language of the Georgia statute making provisions for privileged communications. Accordingly, the Court held that communication of false reports regarding the trade of another, calculated to injure him therein, do not fall within the privileged communications provided for in the Georgia statute.

Petitioner complains that it has been discriminated against by reason of the decision of *Cochran v. Sears, Roebuck & Co.*, 72 Ga. App. 458. In the first place, that decision did not involve any statement regarding the trade of another. In the second place, the Constitution of Georgia (Article VI, Section II, Paragraph VIII; Georgia Code Section 2-3708) provides:

> "The decisions of the Supreme Court shall bind the Court of Appeals as precedents."

Hence, the above Court of Appeals decision cannot, and does not, change the law of Georgia as expressed in the decisions of the Georgia Supreme Court construing and applying the Georgia statute making provision for privileged communications. In other words, the above Court of Appeals decision must yield to the decision in *Johnson v. The Bradstreet Co.* as a binding precedent, and the Court of Appeals is forbidden by the Georgia Constitution to render any opinion in any way at variance with the Georgia Supreme Court decisions.

One of the contentions of petitioner, expressed in the argument, is that subjecting it to liability for libelous false statements regarding the trade of another deprives it of the right to pursue a lawful occupation. This is, in effect, contending that making libelous false statements against another in regard to his trade is a lawful occupation. The truth of the matter is that petitioner is not in any way deprived from pursuing the occupation of making correct credit reports and may pursue that occupation subject to liability under the general libel statutes for publishing false reports regarding the trade of another calculated to injure him therein.

It is submitted that the failure of the district court to follow and apply the binding and controlling Georgia decisions regarding the meaning and interpretation of the Georgia privileged communications statute was clearly erroneous, and the Fifth Circuit correctly reversed the district court, and correctly set forth reasons why the doctrine of *Erie R. Co. v. Tompkins*, 304 U. S. 64, 84 L. Ed. 1188, should not be deviated from in this case.

As to the contention of petitioner that the false reports were entitled to a constitutional privilege under the First and Fourteenth Amendments to the Constitution of the United States, the district court denied this contention and it is submitted that such decision of the district court was correct and supported by *Grove v. Dun & Bradstreet, Inc.*, 438 F. (2d) 433, cert. den., 404 U. S. 898; *Kansas Elec. Supply Co. v. Dun & Bradstreet, Inc.*, 448 F. 405, U. S. 1026, and *Oberman v.*

Dun & Bradstreet, Inc., 460 F. (2d) 1381; *Packaging Industries, Inc. v. Dun & Bradstreet*, 67 Civil 4638 (S. D. N. Y. 1969).

It is respectfully submitted that the decision of the Fifth Circuit was correct and in accordance with applicable law; that the Petition for Certiorari does not show any special or important reasons for the grant of the writ; and that the Petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing brief has been served on Hugh M. Dorsey, Jr., attorney of record for petitioner, Dun & Bradstreet, Inc., by depositing a copy of same in the United States Mail, postpaid, addressed to him at his post office address.

This ____ day of February, 1974.

Of counsel for Respondent,
David Pope Hood